Claims Guides

Dangerous Cargoes: Legal Implications

This guide will focus on what makes a cargo dangerous, as well as owner's rights under a charter party or bill of lading as a result of carrying such cargo but also the potential defences available to charterers and cargo interests.

Dangerous cargo at common law and under the Hague-Visby Rules

Under both common law and the Hague-Visby Rules (HVR), a cargo will be dangerous if it risks/causes physical damage to the ship or other cargo onboard the ship. The nature of the danger can be corrosion, explosion, fire, liquefaction, or a cargo which would subject the ship to legal or political risks, causing delay, detention or confiscation.

The concept of dangerous cargo at common law is however wider and may include a situation where there is no threat to the physical damage of the cargo or ship but merely a risk of significant delay – a risk often described as making the cargo "legally" dangerous. A prolonged delay due to breach of a local regulation in relation to the cargo may therefore give rise to a claim under common law, but not under the HVR. However, if the delay results in deterioration to other cargo, then the cargo may be deemed to have been dangerous under the HVR.

Time lost as a result of loading dangerous cargo and Master's rights to ascertain the condition of the cargo

If the cargo is found to be dangerous, then charterers will be unable to put the ship off hire or make a claim in damages, as they cannot rely on the consequences of their own breach to justify not paying hire. What if the crew refuse to load cargo but the cargo ultimately turns out to be safe, however?

(a) Is the ship off hire? "…default of men…"

In order for charterers to place the ship off hire, the event causing the delay must come within those listed in the relevant off-hire clause or clauses. In the NYPE 1946 charter, which is still the most commonly used form for the carriage of dry bulk cargoes, there is no listed event which would permit the charterers to put the ship off hire in these circumstances.

If the words "…default of men…" (listed in the NYPE 1993) are added (they are also often added as an amendment to the 1946 form), it would cover the situation where the officers or crew refuse to perform all or part of their duties as owed to the shipowner. However, these words have a limited meaning and do not cover loss of time due to the crew's negligent or inadvertent non- or bad performance of their duties (The Saldanha [2011] 1 Lloyds rep 187). It is, therefore, arguable that the ship would not be off hire under these standard clauses if the crew refuse to load the cargo in the mistaken belief that the cargo is dangerous. That is not the end of the story, however.

(b) Claim for damages: breach of employment orders and the due dispatch obligation

If the ship is found not to be off hire then charterers may still have a claim in damages for failure to follow their employment orders with due dispatch. However, charterers will have to prove that the cargo was lawful and harmless, though delay in complying with orders due to a reasonable suspicion or concern may prevent any claim in damages (see below).

If a clause paramount is incorporated into the charter, owners may potentially benefit from Article IV rule 2 (a) of the Hague, Hague Visby Rules or similar provisions, provided it can be shown that the act or omission in question relates primarily to care for the vessel and only indirectly relates to the cargo. That Article states as follows: "Neither the owner nor the ship shall be responsible for loss or damage arising or resulting from... (a) act, neglect, or default of the master, mariner, pilot or the servants of the owner in the navigation or in the management of the ship...".

In such instances, the owner may (subject to the above proviso) not be liable for any loss of time which results from an error in management, such as wrongly ascertaining the dangerous nature of the cargo, (The Aquacharm [1982] 1 Lloyd's Rep. 7 and more recently, The Privocean [2018] 2 Lloyd's Rep 551).

(c) The master has reasonable time to ascertain the condition and safety of the cargo

The Master is usually required to perform voyages with due dispatch. If upon loading there are reasonable doubts as to the safety of the cargo, the Master is entitled to delay for a reasonable period of time to assess the cargo before agreeing/continuing to load it if and when the Master is satisfied that it is safe, without the ship being off hire (see The Houda [1994] 2 Lloyd's Rep. 541).

What is reasonable is a question of fact and should be determined on a case by case basis in terms of how a person with reasonable prudence would have acted in the prevailing circumstances. In assessing the reasonableness, the Master need not possess any greater knowledge or experience of the cargo in question than any other reasonable Master. Any delay beyond such delay as is reasonable will be a breach of the due dispatch obligation and a claim in damages will arise absent any applicable exclusion.

(d) Repudiatory breach

Once the stage is reached where a reasonable person would have agreed to carry the cargo, but the Master still refuses to load the cargo and it is in fact safe, owners may be in repudiatory breach of the charter, entitling charterers to terminate and claim damages. Similarly, if the cargo is found to be dangerous but charterers refuse to substitute the cargo, charterers may be in repudiatory breach themselves, though if part of the cargo has already been loaded practical problems may arise for the owners as to how to enforce its discharge if the charterers / shippers do not co-operate and an interlocutory order before a local Court may have to be considered to engage their co-operation, failing which the owners may need to take the matter into their own hands (though in practice this is not without its difficulties).

Owner's rights and remedies against the shipper/receiver/charterer

(a) Hague/Hague-Visby Rules

Where the Hague/Hague-Visby Rules (Art. IV(6)) are incorporated in the charter or bill of lading, the owner and/or carrier may, at any time before discharge, land the cargo at any place, destroy it, or render it innocuous. The shipper will not be compensated as a result of such actions by the owner.

The shipper (and/or charterer if the HVR are incorporated in the charter) shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. The shipper/charterer's liability will be strict, and it will be no defence that the shipper had no knowledge of the dangerous nature of the cargo.

If a receiver takes or demands delivery of the cargo or makes a claim under the contract of carriage in respect of the goods, they probably become subject to the same liability as the shipper.

(b) Express provisions in the charter and implied indemnity

Many charters have specially tailored protective clauses which give express indemnities against the charterer and provide a comprehensive code governing the owner's rights in relation to some kinds of dangerous cargo, including who bears the risk regarding time and expenses. One example is the BIMCO charterparty clause for solid bulk cargoes which may liquefy.

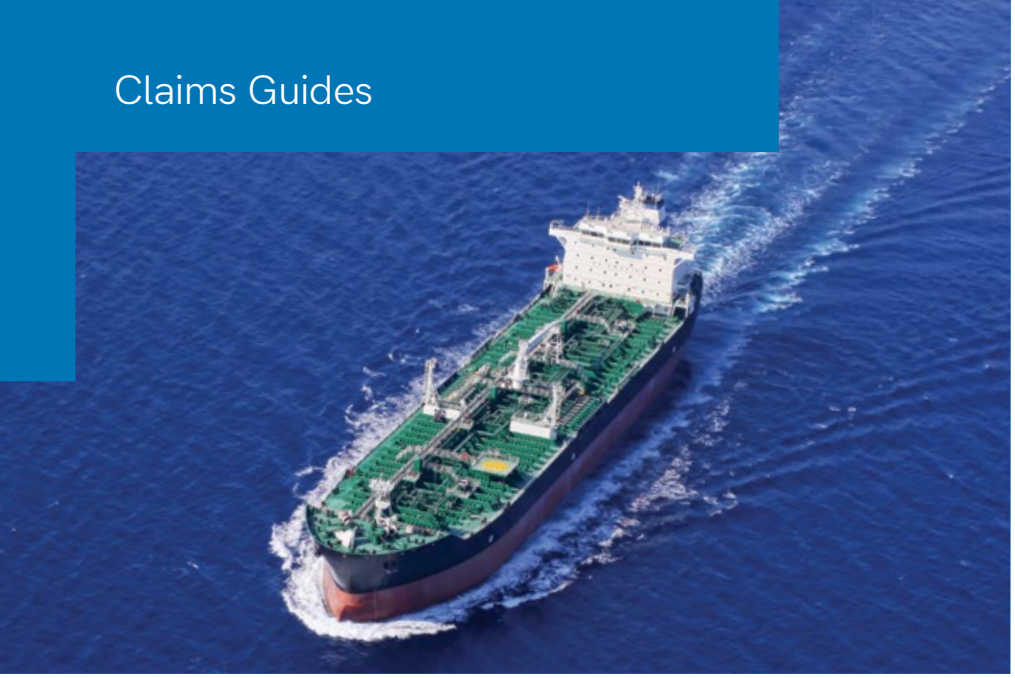
Owners may also have an implied indemnity if they can show that the loss arose out of a risk which they had not agreed to bear. The scope of the indemnity is however narrow as a foreseeable risk may not fall within the indemnity (The Island Archon [1994] 2 Lloyd's Rep. 227). It is debatable whether the implied indemnity survives when there is a specific protective clause relating to a particular cargo, but in practice it may not be needed where an express indemnity is included.

Charterers/cargo interests defences

(a) Claim under the Hague/Hague-Visby Rules (Art. IV(6): owner's consent

The owner may lose their right to damages if it has consented to the carriage of a dangerous cargo. The notion of consent, whether it is actual or constructive, is closely related to the knowledge of the ordinarily experienced and skilful owner of goods of the general kind shipped.

However, whilst the owner may have agreed to carry a potentially dangerous cargo such as an IMSBC "Group A" cargo, they may not have consented to carry the cargo if there is a misrepresentation in the moisture content. Similarly, a cargo may be correctly described but have particular dangerous characteristics, of which the owner is ignorant and has therefore not consented to.



(b) Can the owner be estopped from making a claim?

Where the claim is not made under Art. IV (6) of the Hague/Hague-Visby rules, it may be difficult for charterers to argue that owners have waived their right to claim by agreeing to carry a visibly dangerous cargo. This is because although owners may have agreed to carry the cargo, they will not have necessarily waived their right to claim damages (The Kanchenjunga [1990] 1 Lloyd's Rep. 391); the burden to show that they have is high and will fall on the charterers. In short, an owner will only deprive themselves of the right to claim damages where they make an unequivocal representation that they will not treat the charterer's order as a breach, i.e. not only are they prepared to carry it to destination and take the risks of the voyage, but they are releasing the charterer from any claim should anything go wrong. Shipowners will rarely do that where there are safety concerns regarding the cargo and indeed will often expressly reserve such rights - and it is always best to do so as a matter of good practice, difficult though a waiver may be for the charterers to prove.

(c) Break in the chain of causation

Owners must prove a chain of causation between the shipment of the dangerous cargo and the loss claimed. The test is whether the charterer's employment order is an effective cause of the loss or damage (it does not however have to be the sole cause (The Aconcagua [2010] EWCA Civ 1403). Where there are cooperating causes (dangerous cargo and unseaworthiness) the owner may well be prevented from claiming damages for breach because of the overriding effect of Article III.1 of the Hague/Hague-Visby Rules (The Fiona [1994] 2 Lloyd's Rep. 506).

Once owners have made a prima facie case on causation, charterers will have to prove a break in the chain of causation in the form of an intervening act of such impact that the loss can no longer be regarded as having been caused by charterers act or omission.

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